IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 310

JOHN FAKOURI, *Petitioner*,

v.

JOSE MACIEL CADAIS, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JAMES CRAIG PEACOCK,
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EDWARD DUBUISSON,
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PETITION FOR WRIT OF CERTIORARI.

The petitioner, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit (R. 247) affirming a judgment of the District Court of the United States for the Western District of Louisiana (R. 54-56), which in turn annulled and set aside a judgment of the Twenty-seventh Judicial District Court of the State of Louisiana.

JURISDICTION

The original judgment of the Circuit Court of Appeals was entered on February 22, 1945 (R. 247). Application for rehearing was duly filed by the present petitioner on March 14, 1945 (R. 248), and was denied on May 15, 1945

(R. 264). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether a foreign official record may be proved in a Federal Court otherwise than in one of the four methods provided in Rule 44 of the Federal Rules of Civil Procedure, entitled "*Rule 44. Proof of Official Record. (a) Authentication of Copy. * * *. (c) Other Proof,*" (and particularly whether Rule 43 (a), entitled "*Rule 43. Evidence. (a) Form and Admissibility,*" authorizes any still additional method of authenticating and proving such a record)?

2. Whether a state statute is an "applicable statute" within the meaning of Rule 44(c), which authorizes the proof of such a record "by any method authorized by any applicable statute or by the rules of evidence at common law?"

Statement

This suit invoked the jurisdiction of the United States District Court for the Western District of Louisiana on the ground of diversity of citizenship. The plaintiffs (respondents in this Court) alleged themselves to be citizens of Brazil (R. 3). The defendant (petitioner in this Court) is a citizen of Louisiana (R. 3, 39).

The plaintiffs, as or in behalf of the alleged sole heirs of decedent Elias Mansaur, sought to annul Mansaur's will of July 21, 1940, and to set aside a judgment of a Louisiana state court which had duly admitted that will to probate and had awarded the decedent's residuary estate to defendant as universal legatee thereunder. The complaint alleged that plaintiff Jose Maciel Cadais and his seven minor brothers and sisters (in whose behalf their mother, Maria Maciel Cadais, as their natural tutrix or guardian was joined as the other plaintiff) were nephews and nieces and sole heirs of decedent Mansaur. (R. 1-10.)

The District Court held the will invalid, and entered judgment for the plaintiffs. It rendered no opinion, and stated no reason other than the brief explanation "because it [the will] does not meet the specific requirements established by our law". (R. 54-56, 175.) While the judgment of the District Court in general terms apparently remands the case to the state court for further consideration of such matters as probate of an earlier 1939 will and consideration of claims of creditors, there also appears on the face of the judgment, a serious question as to whether such a course may not be rendered wholly futile by the conflicting specific provisions of the judgment which go to the extreme of expressly awarding the entire gross inventoried estate of the decedent to the non-resident alien heirs (R. 16-31, 34-35, 43-45, 54-55).

The court below affirmed. It devoted a large part of its original opinion (R. 240-247) and all of its opinion on the motion for rehearing (R. 257-263) to consideration of the validity of the 1940 will. Both opinions show that its consideration and decision of this branch of the case turned wholly on a single narrow and extremely technical question as to the application of a long line of Louisiana cases, four of which were quoted from and discussed in the first opinion, and twelve were cited and considered in the second opinion. Mansaur's will was of a kind known in that state as a "nuncupative will by public act." The state Code (Arts. 1578 ff.) may be summarized as requiring that such a will "be received by the notary, dictated by the testator, written down by the notary, and read to the testator, all in the presence of the witnesses; and that 'express mention' must be made in the will itself that the foregoing requirements have been complied with." *Succession of Vidal*, 44 La. Ann. 41, 10 So. 414. No particular form of words is, however, required, and in some of the cases considered by the court below (e.g. at R. 257-259) the state courts had upheld such wills because it could be "fairly inferred" from the will itself that all formal requirements had been

satisfied. But in the instant case, despite the recurrence of three express references to "in the presence of" the witnesses in the course of this short will which takes just one printed page of the present record (R. 12-13), the court below concluded that the notary's failure to expressly "state that it was dictated to the Notary and by him written down as dictated in the presence of the witnesses" (R. 246) was fatal to the validity of the will.

It is believed that the foregoing brief summary of the general facts of the case will afford a sufficient setting for the statement in the immediately following paragraphs of the specific facts which give rise to the two Federal questions directly presented by this petition.

The alleged relationship of the claimants to decedent, their alleged Brazilian citizenship, the alleged emancipation of plaintiff Jose Maciel Cadais, and the alleged authority of their mother to sue in behalf of the seven other unemancipated minors, were all placed squarely in issue by the pleadings (R. 3-6, 39-41). In support of these several allegations, plaintiffs relied upon some fifteen Brazilian public records, the originals of only two of which were offered in evidence at the trial. Over defendant's objection that the copies about to be described had not been authenticated in accordance with F. R. C. P. Rule 44, the District Court allowed the remaining thirteen records (including one marriage record, eight birth certificates, and one death certificate) to be proved by variously certified copies none of which "contained a certificate that the certifying official was the legal custodian of the original document of which the document offered purported to be a copy". The District Judge in this connection expressly ruled that he would not require that there be a statement by the certifying official that he was custodian of the original record. (R. 83-96, 151, 238.) The records in question were absolutely essential links in plaintiffs' case and constituted the only evidence in support of their allegations of citizenship, heirship, and capacity to sue, and, if they were not properly

authenticated and proved, plaintiffs had no right to stand in judgment and the question of the validity of the will was moot.

The court below affirmed on the ground that Rule 44 should be read in connection with Rule 43(a); that the documents in question would have been admissible in the state courts of Louisiana; and that under Rules 43(a) and 44(c) they had therefore been properly admitted (R. 238-240).

The text of these two Rules is printed below at page 10 of our supporting brief.

Reasons for Granting the Writ.

1. The authentication and proof of official records is a matter of constantly recurring everyday importance in the trial of cases in the Federal courts throughout the country. This Court recognized that importance when it devoted an entire Rule to this one subject. By the same token it is submitted that this Court should now accept this case in order to clear away the serious confusion (as more fully explained in the following two paragraphs of these reasons) created by the cryptic ruling in the opinion below that "Rule 44 should be read in connection with Rule 43(a)" and that "under Rules 43(a) and 44(c) the Court below properly admitted the documents" which are here in question (R. 239-240).

2. To the extent that any of these documents could be deemed to be sufficiently authenticated otherwise than under Rule 44, as for example under *Rule 43(a)*, the decision below is in direct conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *United States* v. *Grabina*, 119 F. 2d 863, in which the facts were on all fours with the present facts. There a copy of a Polish marriage certificate authenticated by a local official and by an American vice consul exactly as in the instant case was held incompetent because

"his certificate does not comply with the requirements of Rule 44, Federal Rules of Civil Procedure, * * * because it does not certify that the Mayor of Poreba is the 'lawful custodian' of the record of which exhibit 6 is an 'extract'."

3. If, on the other hand, any of these documents are deemed to be sufficiently authenticated under *Rule 44(c)* it could only be by construing the term "applicable statute" used in that rule as extending to the statutes of a state in addition to those of the United States. In that alternative the decision below would be just as directly in conflict with the clearly indicated intent of the Advisory Committee in drafting the Rules, and by the same token presumably with the intent of this Court in approving the Rules. For the official Note to this Rule in its Report to this Court makes it clear that the Committee was referring to "statutes of the United States," some fifty-two of which it proceeded to specifically cite in that Note. (See section III of our supplemental brief at page 14, below.)

4. Rule 44 provides a well considered and complete scheme for the authentication and proof of foreign official records. The four different alternative methods of such proof which it authorizes (as more fully explained in section I of our supplemental brief at page 12, below) afford ample flexibility to take care of any legitimate purpose. It is most significant that (as shown in section II of our supplemental brief at page 12, below) there runs through those methods which have been approved by this Court in the adoption of Rule 44 the common requirement of a certificate that the initial certifying or attesting officer was the legal custodian of the original record. The decision below strikes out that common requirement. If allowed to stand unreviewed, it will thus definitely undermine and impair the integrity of the whole theory of the Rule which has been approved by this Court. Public policy may well require that a condition such as this which has become so well established

at common law, in our Federal statutes, and now in our Federal Rules of Civil Procedure, should not thus be so nonchalantly tossed aside by the mere *ipse dixit* of the court below, unsupported by any reasoning or explanation of its action (see R. 239-240). Indeed the case at bar itself affords an excellent illustration of the paramount importance of not relaxing the rules for authentication of foreign documents where claims are made or wills are attacked by unknown parties located in a foreign country on another continent. And the importance of maintaining those safeguards will inevitably increase rather than decrease in the aftermath of social, family, and business contacts which are right now arising in constantly increasing volume as a results of the presence abroad of millions of Americans in military and other services.

5. The importance of the two questions presented by this petition is still further enhanced by two other considerations. One is that the effect of the decision below and of its emasculation of Rule 44 is not limited to the proof of foreign official records, but extends equally to the proof in our Federal courts of Federal, state, and local records as well. The other is that (as developed in section IV of our supporting brief at page 14 below) the decision below is simply wrong from the standpoint of the ordinary rules and principles applicable to the construction of statutes or other formal documents.

Wherefore, it is respectfully submitted that this petition should be granted.

JAMES CRAIG PEACOCK,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed at R. 233-247 and is reported at 147 F. 2d 667. Its opinion denying application for rehearing is printed at R. 257-263 and is reported at 149 F. 2d 321.

JURISDICTION, STATEMENT OF THE CASE, ETC.

The required statements with respect to jurisdiction, questions presented, and the facts of the case already appear in the foregoing petition and are therefore not repeated at this point.

Specifications of Error.

The Court below erred:

1. In holding that the thirteen copies of Brazilian public records were sufficiently authenticated and therefore properly received in evidence.

2. In affirming the judgment of the District Court.

Text of Rules 43 and 44.

The pertinent portions of Rules 43 and 44 of the Federal Rules of Civil Procedure, 308 U. S. 718-720, are as follows:

"Rule 43. Evidence.

"(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

* * *

"Rule 44. Proof of Official Record.

"(a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the

certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

"(b) PROOF OF LACK OF RECORD. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

"(c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law."

ARGUMENT.

The reasons submitted in the petition are largely self-explanatory. There will be no repetition in this brief, which will be limited primarily to the annotations to which reference has already been made in the petition.

I. The four methods of proof authorized by Rule 44.

Rule 44 authorizes four different methods of proving official records by copies when the original is not itself conveniently available for introduction in evidence. For convenient reference those four methods are here listed in the order and in the exact words in which they are found in that Rule.

Rule 44 (a) provides that such a record may be evidenced—

(1) "by an official publication thereof, or"

(2) "by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody."

Rule 44 (c) further provides two other alternative methods—

(3) "by any method authorized by any applicable statute, or"

(4) "by the rules of evidence at common law."

II. Certificate re custody of the record a common requirement of the alternative methods so authorized.

The first and, when applicable, presumably the preferable method stated in the Rule, viz.—by an official publication, is in a class by itself in that by its very nature it does not involve certificates of any sort. But by the same token that method is not ordinarily adapted to the proof of records of individual or personal concern, such as the births, deaths, marriages, etc., here in issue, and the other three methods ordinarily require certificates of one kind or another.

And what is much more to the point in the present connection is that inclusion of a certificate as to the actual custody of the record—something which was conspicuously absent in the instant case—is as we will see a common and essential requirement with respect to all three alternative ways of proving foreign records.

Taking those methods up in the order in which they appear in Rule 44, the alternative provision of Rule 44 (a) expressly requires that the copy be

> "attested by the officer having the legal custody of the record, or by his deputy, **accompanied with a certificate that such officer has the custody.**"

Turning next to the provision of Rule 44 (c) permitting resort to "any method authorized by any applicable statute," we find that review of the statutes has been greatly facilitated by the Note included with respect to that Rule by this Court's Advisory Committee in its Report to this Court. In that Note the Committee gathered together and listed a total of 52 such statutes most of which related to authentication of Federal, state, or local records, and only one of which was of general application to foreign records. That one, however, was U. S. C., Title 28, Sec. 695e, enacted as Sec. 6 of the Act of June 20, 1936, 49 Stat. 1561, 1563. It expressly provided—

> "Sec. 6. A copy of any foreign document of record or on file in a public office of a foreign country, or political subdivision thereof, **certified by the lawful custodian of such document**, shall be admissible in evidence in any court of the United States when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, certifying that the copy of such foreign document **has been certified by the lawful custodian thereof.** Nothing contained in this section shall be deemed to alter, amend, or repeal section 907 of the Revised Statutes, as amended (U. S. C., title 28, sec. 689)."

The decision below based the acceptance of the present documents on a Louisiana statute rather than on the common law under which some or all of them might well have been inadmissible for more than one reason (cf. *Duncan* v. *United States*, 68 F. 2d 136, 140-142). It appears, however, that in the absence of some such statutory provision one way or the other, certification as to the legal custody of the originals of foreign records has likewise been repeatedly required at common law. *Schaffer* v. *Krestovnikow*, 88 N. J. Eq. 523, 524-525; *Talcott* v. *Delaware Insurance Co.*, 23 Fed. Cas. No. 13734, page 652; *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 601-602; *American Surety Co.* v. *Sandberg*, 244 Fed. 150, 154, 156-157.

III. Meaning of term "applicable statute" in Rule 44 (c).

Even in the absence of the practice adopted throughout these Rules of making express reference to *state* laws or statutes as such where that was the intent, as for example in Rules 17(b), 62(f), 64, 81(c), 81(e), it would naturally be presumed that a general reference to statutes in Federal rules promulgated by the highest Federal court for the regulation of procedure in all the Federal district courts would mean *Federal* statutes rather than *state* statutes. But there is little need in this instance to fall back on a presumption, for the Advisory Committee's comprehensive Note in submitting Rule 44 to this Court made it clear that the reference therein to any "applicable statute" was limited to "statutes of the United States." That Note began as follows—

> "This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including those specifically provided for by **statutes of the United States. Such statutes are** not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule. Some **of those statutes** are: * * *"

and then continued to list the 52 different Federal statutes already referred to in the preceding section of this argument.

IV. Construction of Rules 43 and 44 by court below was erroneous.

The construction placed by the Court below on Rules 43 and 44 is directly contrary to the established principles of construction. These Rules have the effect of a statute and should be similarly construed. It is familiar law that general language, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment, and that specific terms

prevail over general terms which otherwise might be controlling. *United States* v. *Chase*, 135 U. S. 255, 260; *Ginsberg* v. *Popkin*, 285 U. S. 204, 208. To the extent therefore that the decision of the court below rested on the general provisions of Rule 43(a) it in any event was in direct violation of this cardinal rule of construction.

That is so, even if Rule 43(a) could under any circumstances be construed to cover in general terms the same ground as Rule 44. The real truth is that the court below committed a further initial error in so assuming. For a careful reading of the first sentence of Rule 44 shows that it merely picks up where Rule 43(a) leaves off. It is the *original record* which is or is not primarily admissible as evidence, and that question is properly determined under Rule 43(a) alone. But when that issue, if any, as to relevancy, materiality, etc., has been so determined, then the effect of Rule 43(a), which by its express terms relates to "Admissibility," has exhausted itself. Rule 44 then takes over, and provides how "An official record or an entry therein, when admissible for any purpose [as determined under Rule 43(a)]" may be more conveniently authenticated or evidenced by copies of one sort or another. The court below was thus doubly in error in dragging Rule 43(a) into this case at all.

Thus any support that the decision below was asserted to have in Rule 43(a) is completely eliminated, and as already brought out in the petition it is in that respect in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Grabina*, 119 F. 2d 863. And it has already been shown in the preceding section of this brief that the decision below is equally without support in Rule 44(c) which is limited to Federal statutes, and hence does not permit recourse to a state statute

to support the evidencing of a foreign public document without a certificate as to its official custody.

Respectfully submitted,

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Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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STATEMENT OF THE CASE

This proceeding originated in the United States District Court for the Western District of Louisiana, and invoked the jurisdiction of that court on the ground of diversity of citizenship, the plaintiffs (respondents in this Court) being citizens and residents of Brazil, and the defendant (petitioner in this Court) being a resident of the State of Louisiana.

The complaint sought the annulment of a nuncupative will by public act and a judgment of the

Probate Court of the 27th Judicial District in and for the Parish of St. Landry, Louisiana probating this will, which purportedly bequeathed all of the property, real and personal, of the decedent, Elias Mansaur, to the defendant, John Fakouri.

The plaintiffs, one having been emancipated by judgment of the Court of Orphans, Absentees and Interdicts at Manaus, Brazil, and the others, being minors represented by their widowed mother as their natural tutrix or guardian by virtue of a judgment of the same court, are the nieces and nephews of the decedent and his next of kin.

In this capacity, they attacked the validity of said will on the ground that it was not written in conformity to the laws of Louisiana and on the ground that the testator was mentally incompetent at the time of its execution. They also sought to have said will, the judgment of probate thereof and the judgment putting the defendant into possession of decedent's estate declared null and void, and for judgment recognizing plaintiffs as the sole heirs of decedent and, as such, entitled to the possession of his estate.

The District Court rendered a judgment declaring the will null, setting aside the probate thereof, and recognizing plaintiffs as the heirs at law of the decedent and, as such, entitled to the possession of his estate.

The District Court held the will invalid for two reasons. First, that it was void for failure to state that it was dictated to the notary and by him written down as dictated in the presence of the witnesses, as required by the laws of Louisiana and the Supreme Court decisions of that state interpreting these laws. Second, that the testament was void because it was not signed by the testator, nor did it contain an "express mention" of the "cause that hinders him from signing", as required by the laws of Louisiana.

Having found that the testament was void on its face for lack of compliance with the form required by Louisiana law in the execution of such nuncupative wills by public act, the District Court found it unnecessary to pass upon the question of the testator's mental capacity.

On appeal to the United States Circuit Court of Appeals for the Fifth Circuit, that Court held, after carefully considering the governing laws and authorities:

> "Guided, as we must be, by the interpretation placed upon the applicable local laws by the State's highest court, we must conclude, as did the court below, that the will is void for failure to state that it was dictated to the Notary and by him written down as dictated in the presence of the witnesses." (R. 246)

Having reached the conclusion that the will was void for failure to state that it was dictated to the

notary and by him written down as dictated in the presence of the witnesses, the Circuit Court of Appeals found it unnecessary to pass upon the question of whether the cause which prevented the testator from signing his name was sufficiently set forth in the will, and so stated. (R. 246)

On application for rehearing, the Circuit Court of Appeals again reviewed the decisions of the Supreme Court of Louisiana on the question of the invalidity of the will and reached the same conclusions, and denied the application for rehearing. (R. 257)

The relationship of the plaintiffs (respondents in this Court) to the decedent, their Brazilian citizenship, the emancipation of the plaintiff Jose Maciel Cadais, the authority of their mother to sue in behalf of the seven unemancipated minors, and the death of their father were proved in the form of fifteen official documents obtained in Brazil. Defendant (petitioner in this Court) has never contended, and as a matter of fact has conceded that the documents prove the matter which they are intended to prove, but he has objected throughout these proceedings to their admissibility in evidence because they were not "authenticated in accordance with Rule 44 of the Federal Rules of Civil Procedure."

These documents were certified in Brazil for use in the State of Louisiana and having been certified

in accordance with a state statute of Louisiana making them admissible in evidence as certified, they were admitted by the District Court. On appeal, the Circuit Court of Appeals held that "in the state courts of general jurisdiction of Louisiana, the rules of evidence on the subject of authentication of foreign documents, such as the ones under consideration, are set forth in two state statutes. Under these statutes, the documents in question were admissible in evidence and under Rules 43(a) and 44(c) the court below properly admitted the documents in evidence." (R. 239-240)

The text of these statutes is printed in the Appendix hereto at page 21.

The contents of these documents is not in dispute here, and neither is the question of the validity or invalidity of the will. The sole and only questions raised in this application for writ of certiorari are those raised under the heading "Questions Presented" in defendant's (petitioner in this Court) petition at page 2.

QUESTIONS PRESENTED

The questions presented on which review is sought in this proceeding are set forth on page 2 of the petition for a writ of certiorari.

While it is impossible to determine the precise questions raised by petitioner because of the phrase-

ology used under the heading "Questions Presented", we believe that the following is what the petitioner intended:

1. Whether Rule 44 (a) of the Federal Rules of Civil Procedure prescribes the sole and exclusive method of authenticating and proving an official record?

2. Whether Rule 44 (a) and (c), when construed in connection with Rule 43 (a), permit the admissibility of an official record in a District Court of the United States when such record is authenticated in accordance with a state statute of the state in which the Federal District Court is held and is admissible in the state court under decisions of the highest courts thereof interpreting the state statutes?

ARGUMENT

Because the answers to both questions are determined by the same rules of interpretation and the same authorities, both questions will be discussed together.

Purpose and Effect of Rules 43 and 44 of the Federal Rules of Civil Procedure.

Subparagraph (c) of Rule 44 specifically provides that said rule does not constitute the exclusive method of proving official records, and affirmatively declares that such records may be proved by "any

method authorized by any applicable statute or by the rules of evidence at common law".

The notes of the Advisory Committee in connection with this rule state plainly enough that this rule was designed to provide a simple and uniform method of proving public records, and that it should not have the effect of precluding the authentication of such documents by any other method recognized and followed before the adoption of the rule.

The effect of Rule 44 is simply that it provides a simple and uniform method of proving public records which, if complied with, is sufficient to permit their admission in evidence. The rule was never intended and it was never construed to abolish other recognized methods of authentication, such, for example, as the authentication in accordance with a state statute of the state in which a federal court is held at the time that such records are offered in evidence.

> "The Federal Rules of Civil Procedure, 28 USCA following Section 723c * * liberalized the reception of evidence rather than restricting it." Mutual Life Insurance Co. v. Green, 37 F. Supp. 949, 951.

The federal courts have consistently interpreted this and other rules of federal procedure so as to liberalize and facilitate the introduction in evidence of all documents and oral testimony when admissible either under Rule 44 or any applicable statute or rule

of evidence obtaining in the courts of the state where the federal courts are held.

The report of the Advisory Committee on Rules, as well as the statements of the commentators, which have been published in book form, indicates that Rule 44 (a) covers and is designed to cover the subject matter of numerous sections of the United States Code dealing with the methods of proving official records. However, this rule is not exclusive, *but merely adds another method of authenticating official documents.*

Rule 43 (a) precludes the possibility of any other interpretation by providing that "All evidence shall be admitted which is admissible under the statutes of the United States or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in courts of general jurisdiction in the state in which the United States court is held.", and that "In any case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

The courts have so interpreted these rules since their adoption and have, without exception, permitted the introduction of both documentary and oral evi-

dence when such evidence was admissible under a state statute or rule of evidence.

The rule last quoted is unquestionably applicable to documentary as well as oral evidence. Ulm v. Moore-McCormack Lines, Inc., 117 F. 2d 222; Mutual Life Insurance Co. v. Green, 37 F. Supp. 949; In Re. Robinson, 42 F. Supp. 342, 345; United States v. Aluminum Co. of America, et al., 1 F.R.D. 71.

With these concepts of the two Federal Rules of Civil Procedure relied upon by petitioner in support of his application for a writ of certiorari, we shall consider the paramount question for determination on this application, namely, whether official records should be admitted in evidence in the federal courts when authenticated and proved in accordance with a state statute which declares their admissibility in the state courts of Louisiana?

An Official Record Is Admissible in Evidence in a Federal District Court When Authenticated in Accordance With a State Statute Making It Admissible in Evidence in the Courts of the State Where the Federal Court Is Held.

That official records are admissible in evidence in a federal district court, when authenticated in accordance with a state statute making them admissible in evidence in the courts of the state where the federal court is held, is well established by uniform decisions of the federal courts.

"A question of evidence is to be determined by the rules of the forum. And, Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c, enjoins upon a District Court the use of the rule of evidence, federal or state, which favors admissibility." Franzen v. E. I. DuPont de Nemours & Co., Inc., 146 F.2d 837, 842, Circuit Court of Appeals, Third Circuit, 1944.

"All of the questions presented on this appeal relate to rules of evidence as to which the law of the forum controls. See Pritchard v. Norton, 106 U.S. 124, 133, 134, 1 S.Ct. 102, 27 L.Ed. 104; Restatement, Conflict of Laws (1934 Ed.) #597. In determining such questions, a federal trial court has great latitude under Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, which provides, in material part, that the *statute* or rule, *federal or state*, which favors the reception of proffered evidence shall govern its admissibility." Norwood v. Great American Indemnity Co., 146 F.2d 797, 799, Circuit Court of Appeals, Third Circuit, 1944. (Emphasis ours)

"It is not necessary for us to decide whether this testimony was admissible under the rules of evidence heretofore applied in the federal courts, because we think it was admissible under the Texas decisions. Rule 43 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides all evidence shall be admitted that is admissible under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States District Court is held, and that, in any case, the statute or rule that favors the reception of the evidence governs." Hartford Accident & Indemnity Co. v. Olivier, 123 F.2d 709, Circuit Court of Appeals, Fifth Circuit, 1941.

"Rule 43 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, which governs the admissibility of evidence, directs the court to receive any evidence which would be admitted under the statutes of the United States, or under the rules of evidence formerly applied in equity suits in the federal courts, or under the rules of evidence applied in courts of general jurisdiction of the state in which the United States Court is held. The use of reported testimony from a prior trial in proceedings between the same parties on the same issue is permissable under Massachusetts rules of admissibility when the witness who originally testified cannot be found after diligent search. Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718, 79 A.L.R. 1380."

"Therefore, under the rules of evidence governing the proceedings, I conclude that there was no error in the referee's use of the respondent's testimony given on hearing of the motion to dismiss." In Re Robinson, 42 F.Supp. 342, 345, District Court, D. Massachusetts, 1941.

" * * the rules * * provide directly for the widest admissibility possible under any existing law, state or federal, or relevant evidence. Federal Rules of Civil Procedure, rule 43(a), 28 U.S.C.A. following section 723c; Green, The Admissibility of Evidence under the Federal Rules, 55 Harv. L. Rev. 197; Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure: 2, 47 Yale L. J. 194." Commercial Banking Corporation v. Martel, 123 F.2d, 846, 847, Circuit Court of Appeals, Second Circuit, 1941.

" * * the new Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, have attempted to liberalize admissibility of evidence as much as possible by providing always for the widest rule of admissibility, whether federal law

or federal equity or state rule." Dellefield v. Blockdel Realty Co., Inc., 128 F.2d 85, 93, Circuit Court of Appeals, Second Circuit, 1942.

"Federal courts now follow the most liberal rules available in either state or federal practice in the matter of the admissibility of evidence, * *." Milwaukee Mechanics Ins. Co. v. Oliver, 139 F.2d 405, 407, Circuit Court of Appeals, Fifth Circuit, 1943.

In considering the rules of evidence and applying the most liberal, either state or federal, the Circuit Court of Appeals, Third Circuit, in Pollack v. Metropolitan Life Ins. Co., 138 F.2d 123, 127 (1943), declared:

"We think the admissibility of the certificates under the New Jersey statutes, as applied in New Jersey decisions, is not clear, but we do not need to decide the question because there is a federal statute which is applicable and under Rule 43(a) determines the question."

"Admissibility of the evidence is to be determined by the rules heretofore applied in equity cases in United States courts or by the rules of evidence applied in state courts. The statute or rule which favors the reception of the evidence governs. Rule 43 (a), Federal Rules of Civil Procedure. This rule has liberalized the admissibility of evidence as much as possible by providing always for the widest rule of admissibility whether under federal law or federal equity practice or state rule. Dellefield v. Blockdel Realty Co., 2 Cir., 128 F.2d 85." New York Life Ins. Co. v. Seighman, 140 F.2d 930, 932, Circuit Court of Appeals, Sixth Circuit, 1944.

"Under Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section

723c, all evidence is admissible in federal court proceedings which heretofore has been admissible either under a state rule of law, a federal rule of law, or a statute, and the rule particularly admonishes that the 'statute or rule which favors the reception of evidence governs'." Franzen v. E. I. DuPont de Nemours & Co., 51 F.Supp. 578, 584, District Court, D. New Jersey, 1943.

"Since under Federal Rule 43(a), 28 U.S.C.A. following section 723c, defendant is entitled to rely upon that statute or rule which favors the reception of the evidence, we are to treat its claims as made on that basis." Ulm v. Moore-McCormack Lines, Inc., 115 F.2d 492, 494, Circuit Court of Appeals, Second Circuit, 1940.

"* * we are directed by Federal Rule 43(a), 28 U.S.C.A. following section 723c, to follow that holding on evidence, whether state or federal, which most favors admissibility." Boerner v. United States, 117 F.2d 387, 391, Circuit Court of Appeals, Second Circuit, 1941.

Citing Rule 43(a) of the Federal Rules of Civil Procedure, the Circuit Court of Appeals, Ninth Circuit, held that in a suit in a Federal District Court in Oregon on a war risk insurance policy, a witness was permitted to refresh his memory from memorandum written by him at the time the facts were known to him, on the basis of a statute of Oregon which authorized the admission of such evidence. United States v. Smith, 117 F.2d 911 (1941).

The Circuit Court of Appeals, Third Circuit, in the case of Hornin v. Montgomery Ward & Co., 120 F.2d 500, 501, 504, held that hearsay evidence, intro-

duced in the trial court without objection, was admissible under Rule 43(a) of the Federal Rules of Civil Procedure and rules of evidence under Pennsylvania law, because such evidence was entitled to the same consideration by a federal court sitting in Pennsylvania as that accorded to it by the state courts.

> "Rule 43(a), 28 U.S.C.A. following section 723c, regarding choice of law with respect to rules of evidence, refers to these three sources: (1) federal statutes; (2) rules formerly applied in federal equity suits and (3) local law. If the evidence is admissible under any of these, it is admissible in the federal trial." In Re Messenger, 32 F.Supp, 490, 496, District Court, E.D. Pennsylvania, 1940.
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> "The Federal Rules of Civil Procedure are to be construed liberally. Rule 43(a) is designed to favor 'the reception of the evidence'; that is to say, *all of the evidence* which properly may be introduced in respect to the point in controversy." Pierkowskie v. New York Life Ins. Co., 147 F.2d 928, 933, Circuit Court of Appeals, Third Circuit, 1944.
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> "Under Federal Rules of Civil Procedure, Rule 43(a), 28 U.S.C.A. following section 723c, evidence is to be admitted which is admissible '* * under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.'" Patterson Ballagh Corporation v. Byron Jackson Co., 145 F.2d 786, 790, Circuit Court of Appeals, Ninth Circuit, 1944.
>
> "The plaintiff contends that, even if the evidence was inadmissible under the rules applicable in the federal court, the evidence was admissible under Minnesota law. The plaintiff is entitled

> to the benefit of the more favorable rule. See Rule 43(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c." Roth v. Swanson, 145 F.2d 262, 269, Circuit Court of Appeals, Eighth Circuit, 1944.

In determining the character of proof admissible in the Federal District Court to prove a foreign law, the District Court of the Southern District of New York, in the case of Empresa Agricola Chicama Ltda. v. Amtorg Trading Corporation, 57 F.Supp. 649, 650, declared:

> "Unquestionably, by virtue of Rule 43(a), F.R.C.P., the more liberal rule for the reception of evidence relating to foreign law, now operative in the New York state courts, has become applicable in the federal courts located in New York."

While petitioner expounds at length on his conclusions and analyses in connection with the admissibility of the documents in question, he cites only one case dealing specifically with the admissibility of documents, which is the only question at issue here. And even that case is not pertinent because the facts involved therein were entirely different from the case under consideration.

The case referred to is United States v. Grabina, 119 F.2d 863, and it is no wise material to our discussion, because no effort was made in that case to introduce the documents under authority of a state statute.

After counsel stated that the Circuit Court of Appeals admitted the documents under authority of applicable Louisiana statutes, and after we have cited and quoted from a host of cases holding that its decision in that respect was correct, it appears almost unnecessary to go through the "idle form of articulating the obvious" by saying that the Grabina case is inapplicable because it did not involve a state statute. Nevertheless, since this was the only case cited by petitioner in support of the specific questions involved herein, we think it advisable to make reference to this very obvious distinction.

Furthermore, a reference to the exhibits themselves will readily disclose that some are original documents, and that these as well as the certified copies of official records are on printed forms, which fact is entitled to some weight (Ulm v. Moore-McCormack Lines, Inc. 117 F.2d 222, 224); that they bear either the seal of the court or the registrar of vital statistics, as the case may be, which seals bear the name of the clerk or the registrar of vital statistics; that the signatures of the attesting officer is certified to by a notary, whose signature is in turn certified to by the American Vice Consul, who certifies, in addition, that the acts of the notary or the attesting officer as such are entitled to full faith and credit; that they are complete in themselves, containing the signatures of the

declarants and all other relevant writings; and that these complete documents are bound together with the certificate of the American Vice Consul, perforated and attached with ribbons, and sealed with the seal of the Vice Consul.

Whereas, in the Grabina case, the court found that the document there involved contained nothing to show that it was complete, as it did not contain the name of the rabbi who officiated, nor did it contain the signatures of the declarants, and the court said:

> " 'There is nothing to show a complete record of this marriage, no rabbi's name.' * * Here the document of record, according to the testimony of the expert on Polish law, consists of a declaration by certain persons, who sign the record, of the fact of marriage. Any 'copy' of that document should include a copy of the signatures of the declarants. * * Documentary evidence is not necessarily conclusive; it may be possible for the person against whom it is offered to contradict or explain it. The appellant had steadfastly denied that he contracted a marriage. If confronted with the names of the declarants he might have been able to strengthen his denial by testimony that he never knew the declarants or that one of them, if he purported to be a rabbi, was not in fact the rabbi of the village when the appellant lived there. In our opinion, the 'extract' was too incomplete to be properly admitted over that objection."

Under these circumstances, it is apparent that for this reason, also, the Grabina case is not analogous to the one under consideration.

In compliance with the interpretation of its rules by this Honorable Court, we shall not brief this case on its merits, as was attempted by petitioner in his brief, which questioned such matters as the effect of the judgment of the District Court in relegating the alternative demands of the petitioner herein to the probate court of the Parish of St. Landry for adjudication in proper proceedings, and the validity or invalidity of a nuncupative will by public act under Louisiana laws, other than to say that the decisions of the District Court and the Circuit Court Appeals, both on the original hearing and the application for rehearing, are correct as to these questions as well as to the two which are pertinent to this application for a writ of certiorari.

Petitioner on page 2 of his petition has specifically listed two questions for determination by this court, under the heading "Questions Presented", and the other issues raised in his brief cannot and do not expand or add to the questions stated. General Talking Pictures Corporation v. Western Electric Co., N. Y. 1938, 58 S.Ct. 849, 304 U.S. 175, 546, 82 L.Ed. 1548; Supreme Court Rules, Rule 38, par. 2, 28 U.S.C.A. following section 354; holding that on certiorari the Supreme Court will limit its consideration of the case to questions specifically brought forward by the petition for the writ and included under the caption "Questions Presented".

It is significant that petitioner does not contend that the documents, if admitted, do not prove conclusively the heirship of the respondents, but, as a matter of fact, he admitted, in response to a question put by the presiding Judge of the Circuit Court of Appeals, that, if admissible in evidence, they proved the identity and heirship of respondents. His only effort has been to prevent the introduction of these documents on the ground that there was no formal or technical certification that the attesting officers were legal custodians of the documents certified to, notwithstanding they were certified for use in the State of Louisiana, which state has statutes enacted in 1898, and in continual force and effect since that time, dispensing with the necessity of this formal technical declaration, and making these documents admissible in either the state or the federal courts in their present form.

The statutes referred to are Act No. 164 of the Legislature of Louisiana of 1898, and Section 1436 of the Revised Statutes of Louisiana (Dart's Statutes Sections 2031 and 2032, respectively), and are quoted in the Appendix to this brief at page 21.

We respectfully submit, therefore, that questions under consideration and raised in this petition for writ of certiorari were properly and correctly determined by the District Court and by the Circuit Court of Appeals for the Fifth Circuit, both on the original

hearing and the application for rehearing, and that the documents in question were properly admitted in evidence.

We further respectfully submit that this petition presents none of the reasons set forth in Rule 38, paragraph 5 (a), (b) and (c) of this Honorable Court, nor does it present any other special or important reason for granting the writ prayed for, and petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Section 1 of Act 164 of 1898 (Darts Stat. Sec. 2031) reads in part as follows:

> "Every deed, conveyance, mortgage, sale, lease, transfer, assignment, power of attorney, or other instrument whatsoever, and every oath or affirmation, made or taken in any foreign country, before any ambassador, minister, charge d'affaires, secretary of legation, consul general, consul, vice-consul or commercial agent, and every acknowledgment, *attestation or authentication of any of said instruments, oaths or affirmations made by any of said officers under their official seals and signatures*, shall have the full force and effect of an authentic act executed in this state and it shall not be necessary that the officer be assisted by two witnesses, as in the case of a notary executing an authentic act in this state, but the attestation, seal and signature of the officers shall of themselves be sufficient; nor shall it be necessary that the person appearing before the officer to execute any of said instruments or to take any oath or affirmation, be a resident of the place where the officer is located . . ."

Revised Statutes of Louisiana, Section 1436 (Darts Stat. 2032) provides as follows:

> "It shall be the duty of the several courts of this State to receive the attestation or certificate of any American consul, consul general, vice-consul or commercial agent, residing in any foreign country, as legal evidence of the *attributes and official station or authority* of any magistrate or other civil officer in such foreign country under the laws thereof; which attestation and seal shall be full and complete proof that it emanated from said consul, consul general, vice-consul or commercial agent, as the case may be."